81 -2332

Docket No.

Office - Supreme Court, U.S.
FILED
JUN 22 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Francis N. Crenshaw
Ann K. Sullivan
Crenshaw, Ware & Johnson
1640 Virginia National Bank Building
Norfolk, Virginia 23510
Counsel for Petitioner
Phone No. [804] 623-3000

QUESTION PRESENTED

Whether the Chesapeake and Potomac Telephone Company of Virginia, a public utility created under the laws of the Commonwealth of Virginia, is a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§4601 et seq. (Uniform Relocation Act) when it seeks reimbursement for the cost of removing its distribution facilities from public rights-of-way in the execution of an urban renewal project funded in part by grants from the Department of Housing and Urban Development.

THE PARTIES TO THE PROCEEDINGS BELOW

Moon Landrieu, in his official capacity as Secretary of Housing and Urban Development, was also a party defendant in the proceedings below. As the urban renewal projects involved in this litigation have proceeded to financial settlement, the responsibility for payment of any judgment rendered in this case will fall upon the petitioner, not the Department of Housing and Urban Development (HUD). Accordingly, HUD has not joined in this petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
THE PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PRAYER FOR WRIT	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF FACTS	3
REASONS FOR GRANTING THE WRIT	9
1. The Court of Appeals has decided an important federal question of first impression which has not been, but should be, settled by this Court.	9
2. The Court of Appeals departed from the accepted and usual course of judicial proceedings when it changed the common law despite the fact that there is	15

Page

no statutory language in the Uniform Relocation Act on which to base such a change.

3. The decision below will have an immediate, unfair and nationwide effect. 22

CONCLUSION 27

CERTIFICATE OF SERVICE 29

APPENDIX

A. Opinion of the U.S. Circuit Court of Appeals A-1 to A-14

B. Opinion of the U.S. District Court B-1 to B-13

C. Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency C-1 to C-23

D. Pertinent Provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. D-1 to D-7

TABLE OF AUTHORITIES

Cases

	Page
Alexander v. HUD, 441 U.S. 39, 99 S. Ct. 1572, 60 L. Ed. 2d.28 (1979)	11
Artesian Water Company v. State Department of Highways and Transportation, 330 A.2d. 432, (1974)	13
Erlenbaugh v. United States, 409 U.S. 239, 34 L. Ed. 2d, 446, 93 S. Ct. 477 (1972)	21
Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603, 3 L. Ed. 453 (1812)	21
Mountain States Tel & Tel. Co. v. Boise Redevelopment Agency (unreported)	13
Mumpower v. Housing Authority, 176 Va. 426, 11 S.E.2d 732 (1940)	4
Pacific Tel. and Tel. Co. v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 299 (1978)	13

	Page
Potomac Electric Power Company v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971)	15
Shaw v. Merchants' National Bank of St. Louis, 101 U.S. 557, 25 L. Ed. 892 (1880)	20
Statutes	
District of Columbia Public Utilities Reimbursement Act of 1972 (P.L. 92-495)	16,24
Virginia Housing Authorities Law §36-1, et seq., Code of Virginia	3
Miscellaneous	
House Report 92-906, Committee on the District of Columbia	16,24

No.

In the

SUPREME COURT OF THE
UNITED STATES

October Term, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Norfolk Redevelopment and Housing Authority, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit rendered in this case on March 25, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, as yet unreported, appears in Appendix A. The opinion of the United States District Court for the Eastern District of Virginia, also unreported, appears in the Appendix B. Jurisdiction in the District Court was invoked under 42 U.S.C. 1331.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was rendered on March 25, 1982. This Petition for writ of certiorari was filed within ninety days from the date of the judgment of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§4601 et seq. (Set out in Appendix D.)

STATEMENT OF FACTS

Norfolk Redevelopment and Housing Authority (NRHA), with financial assistance from the federal government through the Department of Housing and Urban Development (HUD) or its predecessor agencies, embarked upon urban renewal projects in the City of Norfolk pursuant to the Virginia Housing Authorities Law, §§36-1 et seq. of the 1950 Code of Virginia, as amended (Housing Authorities Law).

NRHA is an autonomous political subdivision of the Commonwealth of Virginia, independent of but located

in the City of Norfolk, Virginia. In executing urban renewal projects under the Housing Authorities Law, it was the function of NRHA to acquire the land. After this was accomplished it was expected[1] that the City of Norfolk would make changes in zoning and close designated streets to facilitate the ultimate redevelopment of the cleared land by public or private enterprise. The land acquisition process in each project involved hundreds of parcels and required a number of years to complete. It was only after the land on each side of designated public rights-of-way within the project area had been acquired, that

1. We use the word "expected" because the City Council cannot under Virginia law delegate these legislative decisions to NRHA. See Mumpower v. Housing Authority, 176 Va. 426, 11 S.E.2d 732 (1940), at page 452.

NRHA could file its petitions with the City Council requesting closure of the designated streets.[2]

Under Virginia law, when NRHA (like any other purchaser) acquired a parcel of land abutting a public right-of-way, it also acquired the underlying fee of the adjoining right-of-way extending out to its center line, but subject to the public easemert for use and travel. Subsequently, when City Council adopted the street closing ordinance, the public easement for use and travel was extinguished.

2. For example, in the Rosemont Redevelopment Project the acquisition of land began in 1963 and was completed in 1968. Some streets were closed in 1967 and others were closed in 1968. The removal of utilities did not begin until 1972 and was completed in 1975. It was only when the ultimate reuse of the land was settled upon that the utilities were required to relocate their lines.

Chesapeake and Potomac Telephone Company of Virginia (C & P), pursuant to a franchise agreement entered into between its predecessor and the City of Norfolk in 1898, had placed its distribution facilities underground within the public rights-of-way of many of the streets in the City of Norfolk. Some of the streets closed in the urban renewal project areas contained distribution facilities which had been so located. Only when the presence of the distribution lines was inconsistent with the intended future use of the project land was C & P required to remove its facilities. Thus, the removal of the distribution facilities was done to facilitate the purposes of the project; it was not caused by the acquisition of real property.

Under its franchise agreement with the City of Norfolk, C & P paid nothing for the right to place its distribution facilities in the streets and it was obligated, upon request of the City, to abandon or remove them without charge. The cost of removal was a part of its cost of doing business, paid for by the income derived under its rate structure approved by the State Corporation Commission of the State of Virginia.

Prior to the adoption of the Uniform Relocation Act in 1970, C & P removed its facilities from the street rights-of-way whenever requested to do so by the City of Norfolk without making any claim for compensation of any sort. After the passage of the Uniform Relocation Act, C & P continued to relocate its facilities at

its expense whenever it was requested to do so for the convenience of the public use and travel; but it filed the claim involved in this case to recover expenses incurred in removing its facilities from streets which had been closed to carry out the execution of the renewal plans. To the best of Petitioner's knowledge, no other utility company in Virginia has filed such a claim.

The C & P claim was reviewed administratively by NRHA and was denied. A review of that decision was made by the Area Office of HUD, which concurred in the denial. C & P then filed a complaint in the United States District Court for the Eastern District of Virginia seeking a declaration that it was entitled to reimbursement under the Uniform Relocation

Act and seeking payment for that alleged entitlement. The District Court, by an opinion dated June 4, 1981, denied the claim of C & P. Thereupon, C & P appealed to the Circuit Court of Appeals for the Fourth Circuit, which on March 25, 1982 issued its opinion declaring that C & P was a "displaced person" under the Act and that under the circumstances of this case it was entitled to relocation benefits. It is for a review of that opinion that NRHA seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION OF FIRST IMPRESSION WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

The Uniform Relocation Act provides a variety of benefits to persons

who meet the statutory requirements for eligibility as "displaced persons." It authorizes payment of moving and related expenses, (42 U.S.C. §4622); replacement housing payments of up to $15,000 for homeowners and $4,000 for tenants (42 U.S.C. §4623 and 4624); and relocation assistance advisory services, (42 U.S.C. §4625). Nowhere does the Act refer to or authorize payments to utilities for removing their distribution facilities from the public rights-of-way.

The definition of a "displaced person" is contained in Section 101(6) of the Act, 42 U.S.C. §4601 (6), which provides in relevant part:

> "The term 'displaced person' means any person who...moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property...or as the result of the

> written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance...." (App. D, p. D-2)

We are here concerned with an entity which claims it has moved "... personal property from real property, as a result of the acqusition of such real property...."

The fact that this statute has broad, national implications was recognized by this Court in Alexander v. HUD, 441 U.S. 39, 60 L.Ed.2d 28, 99 S.Ct. 1572 (1979) when the Court construed the "written order" clause of the Uniform Relocation Act and noted that it was not designed to compensate just anyone dislocated by a federally assisted program, but only those directly affected by land acquisition. The instant case has the same broad

implications. Futhermore, review by this Court is required because of the abrupt turnabout in the administration of the Act caused by the decision below. The ruling of the Court of Appeals is contrary to the way the Uniform Relocation Act was interpreted by the utility companies and the government agencies.[3] It also is contrary to the settled common law of the sovereign states, contrary to the legislative history of the Act and is contrary to the decision of every

3. 42 U.S.C. §4633 requires the heads of federal agencies to "...consult together on the establishment of regulations and procedures for the implementations of such programs." Prior to enactment of the Uniform Relocation Act HUD had issued its Urban Renewal Handbook which included guidance for relocation assistance. In pertinent part it provided:

> "Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expendi-

court which has considered the issue.[4]

The impact of the decision will be nationwide. The Uniform Relocation Act affects some 50 federal programs administered by 21 federal agencies. In addition, some 41 states have adopted relocation statutes which are similar to the Uniform Relocation Act or permit compliance with the terms of

> ture unless compensation to the company is required under applicable State statutes, judicial decisions, or pre-existing local ordinances or provisions of the company's franchise.****" (RHA §7209.1)

The HUD manual was not changed after adoption of the Uniform Relocation Act.

4. See Pacific Tel & Tel Co. v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 299 (1978); Artesian Water Company v. State Department of Highways and Transportation, 330 A.2d. 432, (1974); Mountain States Tel & Tel Co. v. Boise Redevelopment Agency (unreported State Court opinion printed as Appendix C).

the Act. Accordingly, by virtue of this new interpretation of the Act, countless cities and other state agencies will find that their program funds will be reduced by having to make payments to utilities which were not contemplated or budgeted at the time program applications were filed. The claim in this case, stated at $686,422.53 (plus claimed interest since various stated dates in the mid seventies), will mean that central city capital improvements will have to be reduced by the amount paid to C & P not withstanding the inequitable fact that the C & P rate structure has already compensated C & P for these expenses. In times of increasing federal austerity and with the impact of the New Federalism shifting program expenses to state and local govern-

ments, the impact of this decision on local resources will be far reaching.

2. THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN IT CHANGED THE COMMON LAW DESPITE THE FACT THAT THERE IS NO STATUTORY LANGUAGE IN THE UNIFORM RELOCATION ACT OR ITS LEGISLATIVE HISTORY ON WHICH TO BASE SUCH A CHANGE.

Under the common law, utilities are required to relocate their distribution facilities from the public rights-of-way without compensation when requested to do so by the local governing body. Potomac Electric Power Company v. Fugate, 211 Va. 745, 180 S.E.2d. 657 (1971). The nature of the franchise right was described by the Virginia Supreme Court in Fugate as a mere license, revocable at will, which does not confer any property right on the utility (Ibid., at 747).

It is broadly acknowledged that

any change in a practice established under the common law requires specific legislation. It was because of this rule of construction that the District of Columbia Public Utilities Reimbursement Act of 1972, Public Law 92-495, 86 Stat. 812, was passed (two years after the Uniform Relocation Act had been enacted) to amend the District of Columbia Redevelopment Act of 1945 so as to permit payments to utilities for relocating their facilities from public rights-of-way in urban renewal programs in the District of Columbia. The Commissioners of the District of Columbia supported the legislation, saying in part:

> "In general, costs incident to the removal or relocation of electric, telephone, and gas utility facilities, when such removal or relocation is necessitated by governmental

> action, have traditionally been bourne (sic) by the public utilities affected thereby. This requirement is one of long-standing and is based on the view that utility companies acquire no vested interests in the public space of the District of Columbia by the grant of a franchise to construct and maintain utility lines, conduits, pipes, and related facilities, and that when the needs of the Federal or District Governments so require in connection with the construction of public buildings and other public works, such utilities are obliged to remove, divert, or relocate their facilities without cost to the respective governments...." (House Report 92-906, p.7)

The Uniform Relocation Act and its legislative history are silent as to benefits for the relocation of utility distribution lines. Nevertheless, the Court of Appeals reversed the common law on this point, saying:

"Congress' failure to mention utilities during the debates on the Act and in the legislative history of the Act also provides little reason to exclude utilities from the Act's coverage... (App. A, p. A-6)

"In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we find that a utility comes within the Act's definition of 'business' and thus is a 'displaced person' under the Act." (App. A, p. A-7)

The rationale used by the Court of Appeals is directly opposite to the rule of interpretation applied by this Court in Alexander v. HUD, supra, where it was said:

"In sum, the legislative history of the written order clause reveals no congressional intent to extend relocation benefits beyond the acquisition context. Rather, this clause merely ensures that assistance is available for a distinct group of persons directed to move because

> of a contemplated acquisition, whether the agency ultimately acquires the property or not. The written order clause therefore preserves the original meaning of a displaced person, since it does not apply unless a proposed acquisition directly causes issuance of the notice to vacate and the property acquisition is intended to further a federal program or project.
>
> "The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs ...." (441 U.S. 59, 60) (Emphasis added.)

The Court below likened the situation of the utility to that of a tenant at will, saying:

> "HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. The plaintiff in this case is, in

> certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city." (App. A, p. A-5, 6)

The difference is that utilities are not contemplated or mentioned as beneficiaries under the Act, while tenants, including tenants at will, are expressly provided for in 42 U.S.C. §4624.

It is the province of the legislature, not the courts, to change the common law. This Court has affirmed this principle in several cases. In Shaw v. Merchants' National Bank of St. Louis, 101 U.S. 557, 25 L.Ed. 892, (1880) the Court said:

> "Any such rule of law, being in derogation of the common law, must be strictly construed, for no statute is to be construed as altering the common law, farther than its

> words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." (Page 565).

In Fairfax's Devisee v. Hunters Lessee, 11 U.S. 603, 3 L.Ed. 453, (1812) the Court said:

> "The common law, therefore, ought not to be repealed, unless the language of a statute be clear and explicit for this purpose." (Page 622)

The 1972 amendment of the District of Columbia Redevelopment Act of 1945 was passed in order to provide reimbursement for the removal of distribution facilities by private utility companies. This is strongly indicative that the 1970 Uniform Relocation Act did not authorize such compensation. See, Erlenbaugh v. United

States, 409 U.S. 239, 34 L.Ed.2d. 446, 93 S.Ct. 477 (1972), where the Court said:

> "...a later act can...be regarded as a legislative interpretation of (an) earlier act...in the sense that it aids in ascertaining the meaning of words used in their contemporary setting, in resolving any ambiguities and doubts...The rule is but a logical extension of the principle that individual sections of a single statute should be construed together ...for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject,...." (pp. 243-244)

3. THE DECISION BELOW WILL HAVE AND IMMEDIATE, UNFAIR AND NATIONWIDE EFFECT.

The various trade associations which coordinate information for the utility companies are aware of the decision of the Court of Appeals in

this case. Reports have already been received of instances where claims are for the first time being asserted by utilities for relocation benefits.[5] These claims can be very large, and the retroactive aspect of the decision invites a devastating effect.

The opinion below changed the meaning of the Uniform Relocation Act twelve years after its adoption and after countless local grant-in-aid contracts were in place. For example, in the instant case HUD has taken the position that the urban renewal projects are closed out and no additional funds are available to the locality to

5. Advice as to new claims based on the opinion of the Court of Appeals has been received from Boston, Massachusettes, San Marcos, Texas, Harrisburg, Pennsylvania, New Kensington, Pennsylvania, Pittsburg, California and Dover, New Jersey.

pay any award which might be made. This is but one illustration of the very substantial burden imposed upon localities by the decision below, as the claimed amount, if interest is allowed, will approximate a million dollars. This is not an unusual amount. The data assembled for Congress in support of the 1972 amendment to the District of Columbia Redevelopment Act of 1945 (PL 92-495) tabulated estimates of Utility Relocation and Abandonment Costs under urban renewal in the District of Columbia for the years 1972-1976 as follows:

C & P Telephone Company Company	$292,000.00
Potomac Electric Power Co.	370,000.00
Washington Gas Light Company	320,000.00
	$982,000.00

(See House Report 92-906, Committee on the District of Columbia, at page 8.)

Given the retroactive effect of the decision below, there is no way to estimate accurately the size and number of potential claims or to avoid duplication of payment of these costs of removal. Rates for utilities have been set by state regulatory commissions upon application by the utilities after all cost data (including the cost of removing distribution lines) is assembled. There is no way for the rate payers to be reimbursed for the funds which they have paid to the utility companies to carry the anticipated and actual costs of removing these distribution facilities. Thus the impact of the decision will be to penalize the program funding for countless cities which could not budget for these expenses and to compensate twice the utilities which have

no effective way of returning the money to their customers.

The brunt of this decision is not upon the federal government, but upon cities and local agencies across the land. Federal funds are finite and grant authorization is being reduced wherever possible. Thus, there are but a given number of federal dollars. Prior to this opinion these dollars were not diluted by providing this reimbursement to the utility companies. If the decision stands, the same number of federal dollars will be available, but the localities will be able to do less because of this added expense. If this is a desirable change, it should emanate from the legislature, which can balance equities, give advance notice of the change to prevent unjust enrichment

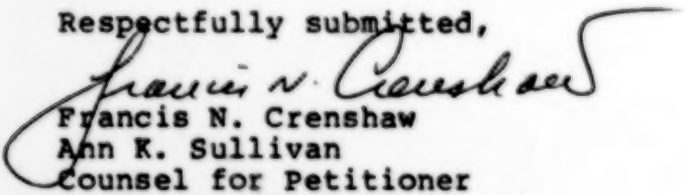
and avoid the harshness of unanticipated retroactivity.

CONCLUSION

The decision of the Circuit Court of Appeals for the Fourth Circuit interprets an important federal statute with national impact. The decision upsets historic funding processes followed by units of local government across the country. It departs from the usual and accepted course of judicial determination of issues, by making an unwarranted change in the common law. It imposes a financial burden on localities for which they cannot budget and did not anticipate.

Finally it provides a windfall for the utilities. A writ of certiorari should be granted.

Respectfully submitted,



Francis N. Crenshaw
Ann K. Sullivan
Counsel for Petitioner
Norfolk Redevelopment and
Housing Authority
1640 Virginia National
Bank Building
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 1982, three copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid to each of the following:

Jack E. Greer and
Joseph L. Kelly
1700 Virginia National Bank Building
Norfolk, Virginia 23510
Counsel for C&P Tlephone Company

Solicitor General
Department of Justice
Washington, D.C. 20530

Peter M. Campanella
Regional Counsel for Department of
Housing and Urban Development
944 Curtis Building
625 Walnut Street
Philadelphia, PA 19103
Counsel for Secretary of HUD

Justin W. Williams
United States Attorney
c/o Michael L. Rhine
Assistant United States Attorney
Post Office Box 60
Norfolk, Virginia 23501

I further certify that all parties required to be served have been served.

Francis N. Crenshaw
1640 Virginia National Bank
Building
Norfolk, Virginia 23510
Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac
Telephone Company of Virginia,

Appellant,

versus

Moon Landrieu, in his official
capacity as Secretary of Housing
and Urban Development,

and

Norfolk Redevelopment and
Housing Authority,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Argued December 7, 1981

Decided March 25, 1982

Before HAYNSWORTH, Senior Circuit Judge, RUSSELL and WIDENER, Circuit Judges.

Joseph L. Kelly, Jack E. Greer (Williams, Worrell, Kelly and Greer on brief) for Appellant; Francis N. Crenshaw (Ann K. Sullivan, Crenshaw, Ware & Johnson; Justin W. Williams, United States Attorney, Michael L. Rhine, Assistant United States Attorney; Sonia C. Jaipaul, John R. Abbot, Peter M. Campanella on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

The questions are whether a utility company can qualify as a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 84 Stat. 1894, 42 U.S.C. §4601 et seq., and whether the plaintiff, Chesapeake & Potomac Telephone Company (C&P), qualifies as a "displaced person" under the facts of this case.

The Department of Housing and Urban Development (HUD) provided funds for the Norfolk Redevelopment and Housing Authority (NRHA) to carry out certain redevelopment projects in Norfolk, Virginia. In

order to carry out these projects NRHA acquired title to certain blighted areas in Norfolk. Because of these projects, C&P was forced to move certain of its telephone lines, cables, conduits, poles and related equipment from what had been streets in Norfolk. Under C&P's franchise agreement with the City of Norfolk, C&P was required to move its lines from public rights-of-way whenever requested by the city to do so.

After moving its lines, C&P requested relocation benefits under the Uniform Relocation Act. C&P's claims were denied at the administrative level. C&P then brought this action in the district court against the Secretary of HUD and NRHA.

After a trial on the liability issue, the district court determined that Congress did not intend for utilities to qualify as displaced persons under the Act. The plaintiff appeals from this order.

I.

The Uniform Relocation Act defines "displaced person" as "any person who... moves... as a result of the acquisition of... real property... for a program or project undertaken by a Federal agency, or with Federal financial assistance...." 42 U.S.C. §4601(6). "Person" is defined as "any individual, partnership, corporation or association." 42 U.S.C. §4601 (5). "Business" is defined as "any lawful activity, excepting a farm operation, conducted primarily - - (A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property; (B) for the sale of services to the public...." 42 U.S.C. §4601(7). Under 42 U.S.C. §4622(a) "displaced persons" are entitled to recover from the government any reasonable expenses incurred in moving

personal property, and a business required to move is a displaced person.

The plaintiff argues that it is a business within the meaning of the Act and thus is entitled to claim reimbursement for expenses as a displaced person. NRHA and HUD argue, however, that the Act was not intended to apply to utilities. HUD bases its argument on the settled common law principle that utilities are not entitled to reimbursement for expenses incurred in moving lines when cities close streets. Because the Act does not explicitly mention utilities as parties that can receive benefits under the Act, and because the legislative history of the Act makes no mention of utilities, HUD argues that the Act was not intended to change the common law. We disagree.

HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at

common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. The plaintiff in this case is, in certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city.

Congress' failure to mention utilities during the debates on the Act and in the legislative history of the Act also provides little reason to exclude utilities from the Act's coverage. In Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39, 51 (1979), the Supreme Court noted that the original "Declaration of Policy" in S.1, 91st Cong., 1st Sess. §201(1969), the bill finally enacted as the Uniform Relocation Act, stated that the purpose of the legislation was

> "to establish a uniform policy for the fair and equitable treatment of owners, tenants, and others displaced by the acquisition of real property in Federal and federally assisted programs to the end that such person shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."

Similar language is contained in the House Report, H.R. 91-1656 (1970). Thus the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose.

In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we find that a utility comes within the Act's definition of "business" and thus

is a "displaced person" under the Act.

II.

HUD contends that the removal of its lines by C&P was not the result of federal acquisition of the real estate. It says that the removal was required by the city's closure of the streets.

Under the statute, relocation expenses are payable if the removal was required "as a result of the acquisition of... real property, in whole or in part..., for a program or project undertaken by a Federal agency, or with Federal financial assistance...." It is true that the city closed the streets, but the removal seems clearly to have been required as a result of the federal acquisition of the real estate.

With respect to most of the relocation costs incurred by C&P, they occurred in situations in which NRHA acquired the land abutting both sides of streets. As

a result of those acquisitions, the project became the owner of the title in fee simple to the land underlying the streets, subject to the city's easement to maintain them as public ways. At the request of NRHA, the city then released its easements so that NRHA became the owner of the land formerly dedicated to use as streets without the burden of that servitude. While in a very technical sense it may have been the city that closed the streets, the city was acting at the direction or request of HUD and NRHA. It was an essential part of the plan of the project that the land occupied by the streets to be closed be acquired free of the city's easement so that such land could be incorporated in the redevelopment plan to the same extent as lands acquired, by purchase or condemnation, from private owners. It was the federal acquisition of the streets, an integral part of the redevelopment plan,

which required removal of C&P's lines.

Some of the removal expense was incurred with respect to lines in streets that were to be widened and other streets which were only partially closed. The record is not sufficient to permit us to decide whether those expenses resulted in whole or in part from the federal acquisition. This should be the subject of further consideration on remand.

III.

Under 42 U.S.C. §4622(a), it is the expense of removal of personal property which is reimbursable, and HUD contends that the utility lines were realty. Its regulations require that what is personal property be determined according to the law of the state in which the property is located,[1] and it relies upon Transcontinental Gas Pipe Line v. Prince William County, 210 Va. 550, 555, 172 S.E.2d 757,

1. 24 C.F.R. §42.40(m)(2).

761-62(1970).

In Transcontinental, gas pipe lines had been installed in land in which Transcontinental had a perpetual easement for the placement, maintenance and operation of the gas line. The easement was unquestionably real property, belonging to the owner of the lines. Under those circumstances, the Virginia Supreme Court held that the gas lines themselves were real estate belonging to Transcontinental. In so doing, it held that the question whether a chattel annexed to real estate has been converted into a fixture principally depends upon the intention of the party making the annexation.

C&P, in placing its lines, could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners. Clearly it intended to maintain ownership and control of these lines which were not

annexed to any real estate owned by C&P of which they might have become a part. Indeed, everyone recognized C&P's right of removal of property which could only have been its personalty.

In similar situations in which a utility's facilities were installed or attached to real estate belonging to others, state courts have found that the facilities remained personal property. See Bangor-Hydro Electric v. Johnson, 226 A.2d 371 (Me. 1967); United Electric Light v. Deliso Const. Co., 52 N.E.2d 353 (Mass. 1943).

HUD and NRHA, however, point to a letter that C&P wrote to the Virginia Commissioner of Revenue requesting that its property be taxed as real property. That it wished its facilities to be treated for purposes of ad valorem taxation as if they were realty is not inconsistent with an intention at the time of

installation that the facilities remain its personal property subject to its control and possible removal. Indeed, if the facilities had become part of the real estate to which they were attached, C&P should have been subject to no ad valorem taxation upon them, for they would not have been the property of C&P.

This result is consistent with the purpose of the personal property limitation. The former owners of land acquired for the redevelopment project are compensated through a purchase agreement or a condemnation proceeding. By agreement, there might be a severance of a fixture and its reconversion to personalty, but once real estate has been sold and paid for, it is no longer subject to removal by the former owner. The Act thus contemplates no reimbursement of expense in connection with the removal of non-removable real estate. It is limited to the expense

of removal of personal property, for the owner is not otherwise compensated for that expense. There is no possibility of double compensation here, for C&P did not sell any land, and it received no compensation through any sale or condemnation.

IV.

We reverse and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac
Telephone Company of Virginia,

Appellant,

versus

Moon Landrieu, in his official
capacity as Secretary of Housing
and Urban Development,

and

Norfolk Redevelopment
and Housing Authority,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is

hereby, stayed pending application of the appellees in the Supreme Court of the United States for a writ of certiorari to this court. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

For the Court-by Direction.

/s/ William K. Slate, II
Clerk

Entered: April 22, 1982

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac Telephone Company of Virginia,

Appellant,

versus

Moon Landrieu, in his official capacity as Secretary of Housing and Urban Development,

and

Norfolk Redevelopment and Housing Authority,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Upon motion of the appellees, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above entitled case be, and it is

hereby, stayed for an additional 30 days to and including, June 21, 1982, pending application of the appellees in the Supreme Court of the United States for a writ of certiorari to this Court.

For the Court-by Direction.

/s/ William K. Slate, II

Entered: May 22, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,

Plaintiff

v.

CIVIL
ACTION
NO. 79-906-N

MOON LANDRIEU, ETC., and
NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants

MEMORANDUM OPINION

The Chesapeake and Potomac Telephone Company of Virginia ("Telephone Company") here sues the Secretary of Housing and Urban Development ("HUD") and Norfolk Redevelopment and Housing Authority ("NRHA"), seeking reimbursement for the relocation of its telephone lines, cables, conduits, poles, and related equipment in

four federally-aided redevelopment projects in the City of Norfolk, Virginia. The central issue is the applicability of the provisions of the Federal Relocation Assistance Act, also known as the Uniform Relocation Act of 1970 ("URA"), 42 U.S.C. §§4601 et seq. The Virginia Legislature has adopted an enabling act to bring Virginia localities under the umbrella of the federal Uniform Relocation Act. See, §§25-235 et seq., Code of Virginia.

It is stipulated that the defendant NRHA acquired title to certain blighted areas in Norfolk for the purpose of redevelopment projects; that the land so acquired included streets in which the Telephone Company's lines and conduits were located; and that in the redevelopment of the areas the Telephone Company was required to relocate its utility equipment in accordance with the plan established for the redevelopment of

each pertinent area.

The statutes relied upon in the Telephone Company complaint are part of the Federal Relocation Assistance Act, 42 U.S.C. §§4601, 4622 and 4637, and read as follows:

> "4622. (a) Whenever the acquisition of real property for a program or a project...will result in the displacement of any person...the head of such agency shall make a payment to any displaced person...for - (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property....
>
> "§4601. Definitions. As used in this chapter -
>
> (5) The term 'person' means any individual, partnership, corporation or association.

> (6) The term 'displaced person' means any person who...moves from real property, or moves his personal property from real property as a result of the acquisition of such real estate, in whole or in part, or as a result of the written order of the acquiring agency to vacate such real property, for a program or a project ....
>
> (7) The term 'business' means any lawful activity, excepting a farm operation conducted primarily -
>
> (a) for the sale of services to the public....
>
> "§4637. A person who moves or discontinues his business, or moves other personal property...as a direct result of any project or program...shall...be deemed to have been displaced as a result of the acquisition of real property."

HUD and NRHA, defendants, deny that the Uniform Relocation Assistance Act includes public utilities such as the Telephone Company or that the statutes are to be given the broad reading necessary to encompass the plaintiff's claim.

Concluding that utilities are not

included under the Uniform Relocation Act of 1970, we DENY the Telephone Company's request for reimbursement thereunder.

I

In the litigation of situations reasonably akin factually to those presented here, courts have been unanimous in denying such utility relocation claims. Consumer Power Company v. Costle, 615 F.2d 1147 (6th Cir. 1980), held that relocation benefit for a gas main which had to be relocated in a new right-of-way in a redevelopment project was denied; Pacific Telephone and Telegraph v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 296 (1978), under a State Act of the same language as the federal Relocation Act, the court found that a public utility accepts franchise rights

in public streets subject to an implied obligation to relocate those facilities at its own expense when necessary to make way for a redevelopment project relieving urban blight. Artesian Water Co. v. State Department of Highways and Transportation, 330 A.2d 432 (Del. 1974), held that the Uniform Relocation Act was not intended to extend coverage to include utilities within its definition of displaced persons or businesses. Mountain States Telephone and Telegraph Company v. Boise Redevelopment Agency, 607 P.2d 1084, 101 Idaho 30 (1980), stated that the overwhelming view in this country is that public utilities are not entitled to relocation costs incurred in making way for governmentally sponsored projects and the Uniform Relocation Act does not change this common law rule. To like effect, Public Service Company of Oklahoma v. Harris, No. 79-C-37-3T (N.D. Okla, August 22, 1980);

Lone Star Gas Company, etc. v. Moon Landrieu, No. 80-100-C (E.D. Okla., March 30, 1981).

These cases are ample authority, upon almost identical factual situations and with the same state and federal statutory overview that a private utility company is not a beneficiary for relocation expenses under the Uniform Relocation Act of 1970.

II

The common law has long been fully developed that utilities, shielded from competition by a franchise, accept their right to install utility lines in public rights-of-way thoroughly cognizant of their obligation to relocate such lines upon demand at no cost to the City, County or State. No authority for this obligation need be cited.

In Virginia during the period of the conception of the Uniform Relocation Act, the mid-1960's, relocation costs of utility lines, particularly in the expansion of highways, raised a real furor of intense and vocal interest both to the utilities attempting to collect reimbursement and to the Virginia Highway Department in its disclaimer of liability for such costs. Potomac Electric Power Company v. Fugate, 275 F.Supp. 566 (E.D. Va. 1967); PEPCO v. Highway Commissioner, 211 Va. 745, 180 S.E.2d 657 (1971); Potomac Power Electric Power Company v. Fugate, 341 F.Supp. 887 (1972); Potomac Elec. Power Co. v. Fugate, 574, F.2d 1163 (4th Cir. 1978). This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the relocation Act of 1970 was before Congress.

In the adoption of the Uniform Relocation Act of 1970 if Congress chose to abrogate such a well known common law principal, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act nor its legislative notes and history. So also, in light of then ongoing litigation over relocation costs, had it been the intent of Congress to reimburse utilities for relocation costs in redevelopment projects, it appears that such intent most certainly would have been specifically stated in light of the fact that Congress had passed a special statute, the Federal Highway Aid Act in 1958, to give such relief to utilities relocating lines to accommodate the interstate highway system.

Lastly, public utilities retrieve their operating costs and the reasonable return on their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses. No other "persons," "corporations," or "displaced persons," except utilities are so protected by a franchise with a non-competitive market area.

The language of the Supreme Court in Alexander v. U.S. Dept. of HUD, 441 U.S. 39 (1979), indicates the thoroughness of the discussion of the Relocation Act before both the House of Representatives and the Senate Committee. Apparently, many witnesses appeared seeking to enlarge the umbrella of reimbursement to many classes of "displaced persons." No mention is made of any appearances before the Committees of Congress by utility representatives. In the end, as Alexander pro-

claims, the extension of relocation assistance was limited to a fairly narrow group and did not include utilities.

> "The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs." Alexander, supra at page 60.

We believe that it is those unprotected, unfranchised corporations and persons which were contemplated by Congress under the Uniform Relocation Act. A utility company, C & P Telephone Company, serving these redeveloped areas under its franchise is not called upon to compete. Its rates are established by petitions to the State Corporation Commission which takes into consideration the accounting data essential to the life of the utility and fixes a rate to cover its costs and expenses. On the other hand, a Mom and Pop business, a grocery store, a retail

furniture outlet, for instance, which is subjected to the sudden trauma of being forced to relocate elsewhere must do so under competitive conditions in which it cannot realistically raise the price of its products to cover extraordinary relocation costs. It must compete in the market place against competitors beyond the redeveloped area who have no such cost to recoup. These are the "persons," "businesses," "displaced persons," to which the Uniform Relocation Assistance Act extends its largesse.

For the reasons herein stated, the plaintiff's prayer for relief is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,

Plaintiff

v.

CIVIL
ACTION
NO. 79-906-N

MOON LANDRIEU, ETC., and
NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants

ORDER

In accordance with a Memorandum Opinion filed this date, the plaintiff's prayer for relief is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

***

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation; BOISE WATER CORPORATION, a corporation; and IDAHO POWER COMPANY, a corporation,

Plaintiffs,

Case No. 52891

vs.

MEMORANDUM DECISION

BOISE REDEVELOPMENT AGENCY,

Defendant.

APPEARANCES:

For the Plaintiff: WARREN E. JONES & MARK S. GESTON, Eberle, Berlin, Kading, Turnbow & Gillespie

For the Defendant: GARY D. BABBITT Hawley, Troxell, Ennis & Hawley

***

This matter involving the plaintiffs' claims for relocation costs reimbursement against the Boise Redevelopment Agency is

before the district court upon remand from the Idaho Supreme Court. In Mountain States Tel. & Tel. Co., et al v. Boise Redevelopment Agency, 101 Idaho 39, 607 P.2d 1085 (1980) the Court held that as a matter of state law, the plaintiffs herein were not entitled to reimbursement for the costs of relocating their respective utility equipment even though the changes were precipitated and necessitated by the defendant's planned redevelopment of downtown Boise. The Court remanded the case for determination of the plaintiff's rights to reimbursement under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C.A., Sec. 4601 et seq. (hereinafter "U.R.A.").

The Supreme Court's opinion and the briefs of the parties set forth the complete history of this matter. The original

district court decision was based upon a Stipulation of Facts submitted by the parties. On remand, the same Stipulation of Facts is offered in support of the plaintiff's present motion for summary judgment.

The Supreme Court's opinion unequivocally explained that at common law, public utilities must relocate at their own expense unless otherwise provided by express statutory language. This is so because the utilities place their equipment permissively, at the convenience of the public, and do not acquire any permanent property interest in the site of the location of their equipment. See State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959). The Court acknowledged that while Idaho Code Sec. 50-2007(h) and 50-2018(j)(3) of the Idaho Urban Renewal Act would have

permitted the Boise Redevelopment Agency (BRA) to reimburse the utilities in this situation, such action by the B.R.A. was not made mandatory by State statute. In view of the strong common law position in Idaho, vis-a-vis the existing non-mandatory statutory provisions, the Supreme Court concluded that the plaintiffs were not entitled to relief under state law.

The Federal relocation assistance statutory scheme is however, couched in substantially different language and plaintiffs urge that they are clearly entitled to relief thereunder.

The U.R.A. was enacted in 1970 accompanied by this brief declaration of policy:

> "The purpose of this title (42 USCA Sec. 4621-4638) is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted pro-

> grams in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 42 USCA Sec. 4621.

A far more comprehensive discussion of the policy underlying the Act is found in its legislative history published in House Report No. 91-1656.

> "The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 is the culmination of lengthy and extensive efforts to develop legislation establishing a uniform policy for the fair and equitable treatment of persons who are displaced, or have their real property taken for Federal and federally assisted programs. The need for such legislation arises from the increasing impact of Federal and federally assisted programs as such programs have evolved to meet the needs of a growing and increasingly urban population. In a less complex time, Federal and federally assisted public works projects seldom involved major displacements of people. There was relatively little

taking of residential or commercial property for farm-to-market routes or for reservoirs or public buildings. Indeed, local support for such projects often resulted in little, if any, cost for land acquisition or rights-of-way. However, with the growth and development of an economy which is increasingly urban and metropolitan, the demand for public facilities and services has increasingly centered on such urban areas, and the acquisition of land for such projects has become the most difficult facet of many undertakings by public agencies. Also, a major public project--be it a highway, urban renewal project, or hospital--inevitably involves the acquisition and clearance of sites which now provide residential, commercial, or other services. As the thrust of Federal and federally assisted programs have shifted from rural to urban situations, it became increasingly apparent that the application of traditional concepts of valuation and eminent domain resulted in inequitable treatment for large numbers of people displaced by public action. When applied to densely populated urban areas, with already limited housing, the

result can be catastrophic for those whose homes or businesses must give way to public needs. The result far too often has been that a few citizens have been called upon to bear the burden of meeting public needs.

* * * * * * * * * * * * * * * * *

The bill as recommended is necessary to eliminate the great inconsistencies that exist among Federal and federally assisted programs with respect to the amount and scope of payments, other assistance provided, and assurance of housing offered. It recognizes that relocation is a serious and growing problem in the United States and that the pace of displacement will accelerate in the years immediately ahead. It recognizes that advisory assistance is of special importance in the relocation process especially for the poor, the nonwhite, the elderly, and people engaged in small business. It recognizes the need for more equitable land acquisition policies in connection with the acquisition of real property for these programs. In short, this legislation recognizes that the Federal Government has a primary responsi-

bility to provide uniform treatment for those forced to relocate by Federal and federally aided public improvement programs and to ease the impact of such forced moves.

This legislation refines and strengthens the basic principles and programs in S. 1. as passed by the Senate. It provides a humanitarian program of relocation payments, advisory assistance, assurance that comparable, decent, safe, and sanitary replacement housing will be available for displaced persons prior to displacement, economic adjustments, and other assistance to owners and tenants displaced from their homes, farms, and places of business. It establishes a uniform policy on real property acquisition practice for all Federal and federally assisted programs. And, perhaps most important of all, it gets to the heart of the dislocation problem by providing the means for positive action to increase the available housing supply for displaced low and moderate income families and individuals.

Each element of the reported bill is discussed in some detail in the section-by-section explanation that follows in this report.

The committee believes that this bill as reported provides for relief of the economic dislocation which occurs in the acquisition of real property for Federal and federally assisted programs. The tools in the reported bill are adequate to deal with the problem. The Congress, however, can only provide such tools. Their effective use depends upon the attitudes and skill of the officials in the executive branch of the Government responsible for their administration. The principle of adequate housing, for example, will by the reported bill, but also imagination, ingenuity, and a desire on the part of its administrators to translate this authorization into equitable and satisfactory conditions for the people affected. It is the committee's intention to review the implementation of this legislation periodically with special emphasis on its impact on displaced persons.

This bill, as reported, is reported unanimously. It is a comprehensive effort to provide equitably for all persons affected by Federal and federally assisted programs." 1970 U.S. Code Congressional and Admin. News, pg. 5850-52.

The operative sections of the U.R.A. in the instant matter are set forth in part in Title 42, U.S.C., Sec. 4622 which provides, inter alia:

> "Sec. 4622. Moving and related expenses
> (a) General provision. Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after the effective date of this Act (Jan. 2, 1971), the head of such agency shall make a payment to any displaced person, upon proper application as approved by such agency head, for--
> (1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;
> (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency; and
> (3) actual reasonable expenses in searching for a replacement business or farm.

* * * * * * * * * * * * * *

(c) Displacement from business or farm operation -- Election of payments--Limitations--Eligibility for business payments--'Average annual net earnings' defined. Any displaced person eligible for payments under subsection (a) of this section who is displaced from his place of business or from his farm operation and who elects to accept the payment authorized by this subsection in lieu of the payment authorized by subsection (a) of this section, may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation, except that such payment shall be not less than $2,500 nor more than $10,000. In the case of a business no payment shall be made under this subsection unless the head of the Federal agency is satisfied that the business (1) cannot be relocated without a substantial loss of its existing patronage, and (2) is not a part of a commercial enterprise having at least one other establishment not being acquired by the United States, which is engaged in the same or similar business. For purposes of this subsection, the term 'average annual net earnings' means one-half of any net earnings of the business or

farm operation, before Federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, or during such other period as the head of such agency determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such period." (Emphasis supplied.)

Title 42 U.S.C. Sec. 4630 also provides in part:

"4630. Requirements for relocation payments and assistance of Federally assisted program--Assurances of availability of housing

Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of this title (Jan. 2, 1971), unless he receives satisfactory assurances from such State agency that--

> (1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 202, 203, and 204 (42 USCS Sec. 4622-4624) of this title;
> (2) relocation assistance programs offering the services described in section 205 (42 USCS Sec. 4625) shall be provided to such displaced persons;"

The parties do not dispute that the B.R.A. is a "state agency" pursuant to Sec. 4630, receiving federal financial assistance for its planned project. The genuine issue is whether or not the plaintiffs are persons who have been displaced by the B.R.A.'s acquisition of real property and are therefore entitled to relocation assistance benefits under the Act.

Title 42 U.S.C. Sec. 4601 provides definitions for the above-noted terms in Sec. 4622. A "person" is defined in subparagraph (5) as "any individual, partnership, corporation, or association."

The term "business" includes any lawful activity conducted primarily for the sale of services to the public. Finally, subparagraph (6) defines the term "displaced person" as:

> "any person who, on or after the effective date of this Act (Jan. 2, 1971), moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 202(a) and (b) and 205 of this title (42 USCS Sec. 4622(a), (b), 4625), as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project."

The defendant's fundamental position is that the U.R.A. was created to provide supplemental benefits only to persons who

were being subjected to an exercise of the acquiring agency's power of eminent domain. Traditionally, an exercise of eminent domain compensates a property owner only for the value of his property on the date of condemnation. U.S. v. 3969.59 Acres of Land, 56 F.Supp. 831 (D. Idaho 1944). Thereafter, the property owner is left to relocate his home or business at his own expense and aggravation. The defendants argue that the U.R.A. was meant to assist such persons and thereby substantially relieve them from bearing an excessive individual burden caused by a project planned for the benefit of the greater public. It is therefore defendant's conclusion that, inasmuch as common law dictates that public utilities are not subject to the exercise of eminent domain but rather must move their equipment pursuant to an authorized

use of police power without compensation, the U.R.A. was not intended to benefit the plaintiffs. The defendants rely on the case of Consumers Power Co. v. Costle, 468 F.Supp. 375, aff'd, 615 F.2d 1147 (1979) to support their position.

The plaintiffs' interpretation of the overall purpose of the U.R.A. is that it was fashioned as a comprehensive and new form of relief wholly independent of a displaced person's entitlement to compensation under the law of eminent domain. In other words, plaintiffs claim that they are entitled to relocation benefits under the Act despite the fact that they have no right to compensation that is dependent upon or parasitic to a right in eminent domain proceedings. They contend that so long as they fit under the definition of "displaced person", they deserve reimbursement for their equipment

relocation expenses.

Counsel have provided the Court with extremely thorough briefs containing their respective arguments and the unfortunately severly limited precedents which are available. Faced with this state of affairs, the parties have necessarily resorted to refined analysis of several of the conceptual wordings found within the Sec. 4601 definitions above-stated such as "personal property" and "acquisition of real property" in efforts to support their positions. The Court finds that these approaches are not particularly persuasive nor are any of the authorities presented absolutely determinative of the singular issue in the instant matter. While the Costle case, supra, most nearly approaches the issues raised in this action, this Court would be uncomfortable in adopting the syllogism by which

that court arrived at its conclusion. Instead, the Court finds it necessary to blend several considerations from the available case law with pertinent principles of statutory construction in arriving at a conclusion.

A most perplexing aspect of this case is the omission of even a casual reference to the plight of public utilities in either the text of the Act or in its exhaustive legislative history. This omission seems inexplicable in view of the fact that we are informed that the U.R.A. was expressly devised to take into consideration the disruption anticipated by federally assisted projects in urban areas where the presence of utilities is absolutely foreseeable! The parties have skillfully attempted to bolster their respective positions based upon the "logical" inferences to be drawn

from Congress' failure to specifically address this situation.

As a practical matter, it is likely that the preponderance of persons affected by the U.R.A. are indeed persons who would also be entitled to "just compensation" from the project agency under the law of eminent domain. However, it is clear that U.S.C. 42 Sec. 4624, pertaining to lessees and tenants, aims to provide the relocating assistance benefits to displaced persons who have no rights to compensation in the law of eminent domain. To this extent, it is apparent that the defendant's contention that the U.R.A. was intended purely to supplement benefits enuring to those entitled to compensation in eminent domain proceedings, is not absolutely correct. If the defendant is correct about Congress' intent, then a clear exception was created in 42 U.S.C. Sec. 4624.

The case of Pacific Tel. & Tel. Co. v. Redevelopment Agency of the City of Glendale, 151 Cal.Rptr. 68, 87 Cal.App. 3d 299 (1978) involved a determination of a public utility's right to reimbursement under the California Relocation Assistance Law. This statutory scheme contains definitions of "person", "business" and "displaced person" that are essentially identical to those found at Sec. 4601 of the U.R.A. In that case, the telephone company was forced to relocate its equipment from a public street which, as in the case at bar, had been vacated to make way for a re-development project. The Court first explained that California followed the common law view with respect to refusing to reimburse utilities for the costs of relocating their equipment but noted that the state legislature had on several occasions created clear exceptions for the benefit of utilities in this area.

The telephone company contended that it fell within the definitions prescribed in the California Relocation Assistance Law and that since no provision of that Act specifically excluded reimbursement of utility relocation costs, the legislature intended to include utilities in its broadly drawn definitions. The Court held that in view of the State legislature's historical record of having carved out specific exceptions to the common law rule, the failure of the legislature to specifically provide for utilities reimbursement in the Relocation Law argued forcefully and conclusively against the utility's position. The Court stated:

> "Whether the costs of such relocation should be shifted from the utility's rate payers to other taxpayers is a matter of policy for the Legislature to determine. (Pacific Tel. & Tel. Co. v. Redevelopment Agency, supra, 75 Cal.App.3d

> at pg. 968, 142 Cal.Rptr. 584, A Study Relating to Sovereign Immunity, supra, 5 Cal. Law Revision Com.Rep., p. 80; Van Alstyne, Taking or Damaging by Police Power: The Search For Inverse Condemnation Criteria, 44 So. Cal.L.Rev. 1, 53-56 (1971); Note, 6 UCLA L.Rev. 336, 338 (1959).) The Legislature has not so shifted the burden in the relocation assistance law." 151 Cal.Rptr. at pg. 70.

The overwhelming common law view in this country is that public utilities are not entitled to reimbursement for costs incurred while relocating its equipment to make way for governmentally sponsored projects. The U.R.A., if it is held to reverse this well-established rule, is to be regarded as a statute in complete derogation of common law.

> "Unless clearly so stated and apparently and evidently so intended, a statute will not be construed to have changed common law." Mason v. Hillsdale Hwy. Dist., 65 Idaho 833, 154 P.2d 490 (1945).

Given the stated intent of Congress to unify and coordinate the various federal relocation assistance programs, the state of the common law, and the consequent failure of Congress to clearly provide for the needs of the public utilities in their relocation requirements, it is the opinion of this Court that the U.R.A. was not intended to include with its coverage the reimbursements sought by the plaintiffs in this action.

Summary judgment is therefore granted in favor of the defendant.

IT IS SO ORDERED.

Dated this 27th day of October, 1980.

/s/ Jesse R. Walters
Jesse R. Walters
District Judge

PERTINENT PROVISIONS OF THE UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970

§4601. Definitions

As used in this chapter --

(1) The term "Federal agency" means any department, agency, or instrumentality in the executive branch of the Government (except the National Capital Housing Authority), any wholly owned Government corporation (except the District of Columbia Redevelopment Land Agency), and the Architect of the Capitol, the Federal Reserve banks and branches thereof.

(2) The term "State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, the Trust Territory of the Pacific Islands, and any political subdivision thereof.

(3) The term "State agency" means the National Capital Housing Authority, the District of Columbia Redevelopment Land Agency, and any department, agency, or instrumentality of a State or of a political subdivision of a State, or any department, agency, or instrumentality of two or more States or of two or more political subdivisions of a State or States.

(4) The term "Federal financial assistance" means a grant, loan, or

contribution provided by the United States, except any Federal guarantee or insurance and any annual payment or capital loan to the District of Columbia.

(5) The term "person" means any individual, partnership, corporation, or association.

(6) The term "displaced person" means any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project.

(7) The term "business" means any lawful activity, excepting a farm operation, conducted primarily--

(A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

(B) for the sale of services to the public;

(C) by a nonprofit organization; or

(D) solely for the purposes of section 4622(a) of this title, for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

(8) The term "farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(9) The term "mortgage" means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property, under the laws of the State in which the real property is located, together with the credit instruments, if any, secured thereby.

Pub.L. 91-646, Title I, §101, Jan. 2, 1971, 84 Stat. 1894.

§4621. Declaration of policy

The purpose of this subchapter is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and

federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

Pub.L. 91-646, Title II, §201, Jan. 2, 1971, 84 Stat. 1895.

§4624. Replacement housing for tenants and certain others

In addition to amounts otherwise authorized by this subchapter, the head of the Federal agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under section 4623 of this title which dwelling was actually and lawfully occupied by such displaced person for not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling. Such payment shall be either--

(1) the amount necessary to enable such displaced person to lease or rent for a period not to exceed four years, a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, and reasonably accessible to his place of employment, but not to exceed $4,000, or

(2) the amount necessary to enable such person to make a downpayment (including incidental

expenses described in section 4623(a)(1)(C) of this title) on the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, but not to exceed $4,000, except that if such amount exceeds $2,000, such person must equally match any such amount in excess of $2,000, in making the downpayment.

Pub.L. 91-646, Title II, §204, Jan. 2, 1971, 84 Stat. 1897.

§4630. Requirements for relocation payments and assistance of Federally assisted program; assurances of availability of housing

Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all of part of the cost of any program or project which will result in the displacement of any person on or after January 2, 1971, unless he receives satisfactory assurances from such State agency that--

(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 4622, 4623, and 4624 of this title;

(2) relocation assistance programs offering the services described in section 4625 of this title shall be provided to such displaced persons;

(3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 4625(c)(3) of this title.

Pub.L. 91-646, Title II, §210, Jan. 2, 1971, 84 Stat. 1899.

§4633. Regulations and procedures

Consultation of heads of Federal agencies

(a) In order to promote uniform and effective administration of relocation assistance and land acquisition of State or local housing agencies, or other agencies having programs or projects by Federal agencies or programs or projects by State agencies receiving Federal financial assistance, the heads of Federal agencies shall consult together on the establishment of regulations and procedures for the implementation of such programs.

Establishment of regulations and procedures to assure fair, reasonable, and uniform administration, prompt or advance payment, and review of application

(b) The head of each Federal agency is authorized to establish such regulations

and procedures as he may determine to be necessary to assure--

(1) that the payments and assistance authorized by this chapter shall be administered in a manner which is fair and reasonable, and as uniform as practicable;

(2) that a displaced person who makes proper application for a payment authorized for such person by this subchapter shall be paid promptly after a move or, in hardship cases, be paid in advance; and

(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the head of the Federal agency having authority over the applicable program or project, or in the case of a program or project receiving Federal financial assistance, by the head of the State agency.

Other regulations and procedures

(c) The head of each Federal agency may prescribe such other regulations and procedures, consistent with the provisions of this chapter, as he deems necessary or appropriate to carry out this chapter.

Pub.L. 91-646, Title II, §213, Jan. 2, 1971, 84 Stat. 1900.